

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

DEBORAH OBERG,

Plaintiff,

v.

CAROLYN W COLVIN, Acting
Commissioner of Social Security,

Defendant.

CASE NO. 13-5581 RJB-KLS

ORDER ADOPTING REPORT AND
RECOMMENDATION

This matter comes before the Court on the Report and Recommendation of U.S. Magistrate Judge Karen L. Strombom. Dkt. 27. The Court has considered the Report and Recommendation (Dkt. 27), Plaintiff's Objections (Dkt.28), Defendant's Response to Plaintiff's Objections (Dkt. 29) and Plaintiff's Reply (Dkt. 30), and is fully advised.

I. **FACTS**

The facts and procedural history are in the Report and Recommendation (Dkt. 27, at 1-5) and are adopted here.

1 Plaintiff raises two objections to the Report and Recommendation. Dkt. 28. First, she
2 argues the ALJ violated the Ninth Circuit Court of Appeal's mandate and did not meet his
3 burden of production at stage five when he failed to use vocational expert testimony to account
4 for Plaintiff's change in age. *Id.* Second, she asserts the ALJ erred by failing to give germane
5 reasons to reject lay witness testimony. *Id.*

6 II. DISCUSSION

7 The Report and Recommendation (Dkt. 27) should be adopted and Commissioner's
8 decision affirmed. ALJ Johnson complied with the Ninth Circuit's mandate and met his burden
9 of production at stage 5. He properly rejected the lay witnesses' testimony.

10 A. COMPLYING WITH THE MANDATE AND BURDEN AT STEP 5

11 In the opinion prior to the mandate, the Ninth Circuit noted that the Commissioner denied
12 Plaintiff's first application for disability insurance benefits for the period ending July 31, 2003,
13 and that the determination that she was not disabled was *res judicata* and created "a presumption
14 that she was not disabled for the present period, which she claimed began May 23, 2003, and
15 ended June 30, 2005, when her Social Security disability insurance coverage terminated." Tr.
16 1205; *Oberg v. Astrue*, 472 F. App'x 488, 490-91 (9th Cir. 2012). The Ninth Circuit also
17 affirmed the ALJ's decision to discredit Plaintiff's testimony that her condition had worsened
18 after July 31, 2003, after having reviewed the record and finding that it was apparent that the
19 medical evidence indicated no real change in her medical condition since the prior determination.
20 *Id.* The Ninth Circuit also did not find that the ALJ had committed error when he relied "on the
21 2003 determination at Step 5 of the analysis which, of course, relied upon the testimony of the
22 vocational expert." *Id.* The Court did find that the ALJ committed error "when he failed to note
23 that Oberg had changed age categories after the date of the first decision. She went from the
24

1 category of a ‘younger person’ to that of a person ‘closely approaching advanced age,’ but the
2 ALJ did not consider that.” *Id.* (*internal citations omitted*). (Plaintiff turned 50 on April 7, 2005
3 and her coverage terminated on June 30, 2005). The Court stated it was “loath to attempt to
4 determine the effect of the ALJ’s serious error in the first instance—it might affect Oberg’s
5 residual functional capacity, the testimony of the vocational expert, or other aspects of the
6 Commissioner’s decision. Therefore, [it reversed and remanded] for further consideration.” Tr.
7 1205; *Oberg v. Astrue*, 472 F. App’x 488, 491 (9th Cir. 2012).

8 On remand, the ALJ considered Plaintiff’s change in age category and found that it did not
9 change the prior decision or require additional testimony from a vocational expert. As stated in
10 the Report and Recommendation, the ALJ discussed his consideration of the affect of Plaintiff’s
11 change in age as follows:

12 . . . Age is accounted for in the framework of the Medical-Vocational Rules.
13 However, the claimant has transferable skills. Therefore, she is not disabled
14 under Medical-Vocational Rule 202.15. The identical result is achieved with both
15 the “younger person” and “closely approaching advance[d] age” categories
(Medical-Vocational Rules 202.15 and 202.22). Furthermore, the work she could
perform within her residual functional capacity was identified in Exhibit B3,
pages 11 to 12.

16 The residual functional capacity is not affected by a change in age categories
17 because it is not based on age. . . . Also, in the short period of time relevant here,
18 the claimant’s condition did not deteriorate or improve to change the residual
functional capacity finding. While age is not accounted for in the residual
19 functional capacity, age is accounted for in the application of the Medical[-
]Vocational Guidelines as a framework. The Vocational Expert applied this
20 framework in testimony (Ex. B3A11-12). Age can sometimes change the result
within this framework. But, in the present case, the claimant’s change in age
21 category achieved the identical result with both the younger and closely
approaching advanced age Guidelines in the light and sedentary levels
22 (Guidelines 201.22, 202.22, 201.15, and 202.15). Use of the framework of
Guideline 202.22 was not overturned on appeal and the claimant is capable of a
23 reduced range of light work, so Guideline 202.15 is the appropriate additional
framework rule here in light of [the] claimant’s changed age during the relevant
24 period.

1 The vocational expert's testimony would not be affected because the identical
2 result would be achieved with both age categories under the Medical-Vocational
3 Rules, and age does not affect the residual functional capacity. Nor would the
4 change in age category affect any other aspects of the decision.

5 Dkt. 27, at 10 (*citing* AR 1142-43). Plaintiff's argument that the Ninth Circuit required
6 consideration of new expert testimony is without merit. The Report and Recommendation points
7 out that Plaintiff concedes that the change in age categories did not impact her residual
8 functional capacity. Dkt. 27. Plaintiff does not offer any meaningful reason why new expert
9 testimony is required. The ALJ complied with the Ninth Circuit's mandate and met his burden at
10 step 5. Plaintiff's objections do not offer a basis to reject the Report and Recommendation.

11 **B. LAY WITNESSES**

12 The ALJ did not err in rejecting the testimony of the two lay witnesses. As stated in the
13 Report and Recommendation, the ALJ rejected their testimony because 1) it was inconsistent
14 with the claimant's reports, 2) it was based on Plaintiff's presentation, which was determined to
15 be unreliable, 3) broad statements concerning the time period do not "shed additional light on the
16 relevant period," and 4) their statements do not indicate that Plaintiff's condition had worsened,
17 and 5) to the extent that they did, this would be inconsistent with the lack of evidence of seeking
18 treatment. Dkt. 27.

19 The Report and Recommendation's analysis on this issue should be adopted. Except for
20 the second reason, on balance, these are germane reasons for the ALJ to reject the witnesses'
21 testimony. *Thomas v. Barnhart*, 278 F.3d 947, 958-59 (9th Cir. 2002)(conflict between
22 witness's statements and other evidence is a legitimate reason to reject witness statements). The
23 Report and Recommendation (Dkt. 27) should be adopted and the decision of the Commissioner
24 affirmed.

